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In The

SUPREME COURT OF THE UNITED STATES

Nos. 2, 3, and 4, Original

OCTOBER TERM, A. D. 1949

STATE OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA,

Complainants,

vs. No. 2 Original

STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO,

Defendants.

STATE OF MICHIGAN,

Complainant,

vs. No. 3 Original

STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO,

Defendants.

STATE OF NEW YORK,

Complainant,

vs. No. 4 Original

STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO,

Defendants.

BRIEF OF THE STATES OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN AND NEW YORK IN SUPPORT OF MOTION TO DISMISS THE PETITION OF THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO FOR AN INTERPRETATION AND CLARIFICATION OF THE DECREE OF APRIL 21, 1930.

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OCTOBER TERM, A. D. 1949

STATE OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA,
Complainants,
vs.
STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO,
Defendants.
No. 2 Original

STATE OF MICHIGAN,
Complainant,
vs.
STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO,
Defendants.
No. 3 Original

STATE OF NEW YORK,
Complainant,
vs.
STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO,
Defendants.
No. 4 Original

BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR INTERPRETATION AND CLARIFICATION OF DECREE OF APRIL 21, 1930

A. PRELIMINARY STATEMENT

It is a strange fact that during the twenty years that petitioners, the State of Illinois and The Sanitary District of Chicago, have been subject to the terms and conditions of the original decree of April 21, 1930, as amended on May 22, 1933, petitioners have found this mandate clear, unambiguous and understandable, and then, after living under the decree for twenty years petitioners suddenly claim to discover that the terms and conditions of the decree are

obscure and doubtful and, they now say, the decree should be interpreted and clarified.

The petition makes no request for increased diversion but relates solely to the application of the decree with reference to certain construction required to provide necessary sewage disposal facilities for the Sanitary District of Chicago.

An examination of the decree herein, as amended, considered in the light of the history of this litigation, establishes conclusively that the original decree, as amended, is today as clear and unambiguous as it was the day it was issued and requires no clarification. Moreover, there exists no such change in conditions or circumstances since the entry of the original decree, as amended, as would require any interpretation or clarification of the said decree. The alleged change in circumstances set forth in the petition did not warrant the present application to this court for an interpretation and clarification of the decree.

B. HISTORY OF THE LITIGATION

I. *The Original Suits Were Filed in the Year 1922.*

These are original actions brought in this court under Section 2 of Article III of the United States Constitution. The State of Wisconsin filed the first of the several bills of complaint on July 14, 1922. The Wisconsin bill of complaint was amended on October 5, 1925, and the States of Minnesota, Ohio and Pennsylvania became co-plaintiffs with the State of Wisconsin. The amended bill, filed in 1925, sought an injunction to restrain the State of Illinois and The Sanitary District of Chicago from causing any

water to be taken from the Great Lakes-St. Lawrence water shed in such a manner as permanently to abstract and divert the same from that water shed. On April 8, 1926, the State of Michigan filed a separate bill of complaint for the same relief. On October 18, 1926, the State of New York likewise filed a separate bill of complaint, also asking for the same relief. Subsequently, on November 23, 1926, this court ordered the three suits consolidated for hearings before the Special Master. (Wisconsin, et al. vs. Illinois, et al., 273 U. S. 642; see also 278 U. S. 367, 369, 370.)

II. *The Amended Bills Sought to Enjoin the Abstraction of the Waters of the Great Lakes-St. Lawrence System for Sewage Disposal Purposes.*

The amended bills alleged that the abstraction by the State of Illinois and its Agency, The Sanitary District of Chicago, of huge quantities of water through the Chicago Sanitary Canal had lowered the levels of Lakes Michigan, Huron, Erie and Ontario through connecting waterways, and of the St. Lawrence River above tidewater, not less than 6 inches, to the serious injury of the complainant Lake States, their citizens and property owners and that the Acts of Illinois and the Chicago Sanitary District had never been authorized by Congress but were in violation of the rights of the complainant Lake States and their peoples, and that the withdrawals of the water from Lake Michigan were for the purpose of taking care of the sewage of the Chicago area and were not justified by any control Congress had attempted to exercise or could exercise in inter-state commerce over the waters of the Great Lakes, and that such

withdrawals of water were in palpable violation of the Act of Congress of March 3, 1899. These bills of complaint prayed that the State of Illinois and its Agency, The Sanitary District of Chicago, be enjoined permanently from diverting water from Lake Michigan or from dumping or draining sewage into its waterways so as to render it unsanitary, or obstruct the people of the complainant Lake States in navigating them. After the filing of motions, the State of Illinois and The Sanitary District of Chicago filed their respective answers in which they denied the injuries alleged and averred that authority was given for the diversion under the Acts of the Legislature of Illinois and Acts of Congress and permits issued by the Secretary of War as authorized by Congress in the regulation of interstate commerce.

III. *The Findings of Special Master Hughes on the Original Reference Show a Lowering by Petitioners of the Levels of Lake Michigan-Huron of 6 Inches, Thereby Causing Substantial Damage to the Lake States.*

This court referred these causes to Honorable Charles Evans Hughes, as Special Master, and after full hearings the Special Master filed his report on November 23, 1927. The Special Master made a finding that the lowering of lake levels due to the Chicago diversion was approximately 6 inches based on a diversion of 8,500 cubic feet per second, and that this resulted in a substantial and injurious effect upon the carrying capacity of vessels and that it deprived navigation and commercial interest of the facilities which otherwise the Lake States would have enjoyed in

commerce on the Great Lakes. After enumerating the evidence, the Special Master made the following finding, to-wit:

> "I therefore find that the complainants have established that the diversion through the Chicago drainage canal has caused substantial damage to their navigation, commercial and other interests as above stated. * * *" (Report of Special Master Hughes, November 25, 1927, p. 118.)

In his conclusions of law, Special Master Hughes ruled that the permit of the Secretary of War, dated March 3, 1925, under which petitioners were diverting 8,500 c. f. s. was valid and he recommended the dismissal of the suits.

IV. *The Decision of January 14, 1929, Affirmed the Master's Findings as to the Great Losses to the Lake States and Ordered a Reduction in Diversion and the Speedy Construction of Adequate Sewage Treatment Works and Facilities.*

This court in its decision January 14, 1929 (278 U. S. 367 at p. 420-421), overruled the Special Master on his conclusions as to the validity of the permit of March 3, 1925, but affirmed the findings of the Special Master as to the damage and great losses to the complainant Lake States and their citizens and their property owners, which resulted through the illegal diversion at Chicago, and then said:

> "It, therefore, is the duty of this court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis, and thus to restore the navigable capacity of Lake Michigan to its proper level. The sanitary district authorities, relying

on the argument with reference to the health of its people, have much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore, they cannot now complain if an immediately heavy burden is placed upon the district because of their attitude and course. The situation requires the district to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the lake diversion.

"Though the restoration of just rights to the complainants will be gradual instead of immediate, it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project.

"The court expresses its obligation to the master for his useful, fair, and comprehensive report.

"To determine the practical measure needed to effect the object just stated and the period required for their completion there will be need for the examination of experts; and the appropriate provisions of the necessary decree will require careful consideration. For this reason, the case will be again referred to the Master for a further examination into the questions indicated. * * *" (278 U. S. 367 at pp. 420-421.)

The court further held that the Lake States were entitled to a decree which would be "effective in bringing that violation and the unwarranted part of the diversion to an end." (278 U. S. 367 at p. 418.)

V. *The Suits Were Referred Back to Special Master Hughes to Determine the Practical Measures Needed to Dispose of the Chicago Area Sewage Without Diversion and the Time Required for the Completion of Such Works.*

The matter was then again referred back to Honorable Charles Evans Hughes who was directed to take testimony on the practical measures needed to dispose of the sewage without the unlawful diversion of water, the time required for their completion, and the flow from the lake needed for the Port of Chicago, and to report his conclusions for the formulation of a decree. On December 17, 1929, the report of Special Master Hughes on re-reference was filed.

VI. *The Decision on Re-reference (April 14, 1930) Ordered Reduction in Diversion to 1,500 c.f.s. by December 31, 1938 by Which Date the Sewage Treatment Works and Facilities Were to be Completed.*

On April 14, 1930, the decision of this court on re-reference was handed down. (281 U. S. 179) The court, in affirming the findings and recommendations of the Special Master, speaking through Mr. Justice Holmes, again pointed out it was already decided that:

> "the defendants, the State of Illinois and the Sanitary District of Chicago, are doing a wrong to the complainants and that they must stop it. They must find a way out of their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awakened. It can base no defenses upon difficulties that it has itself created. If its constitution stands in the way of prompt

action, it must amend it or yield to an authority that is paramount to the state." (281 U. S. 179 at p. 197.)

The court further held that the cost should be paid by the State of Illinois and the Sanitary District of Chicago "who have made this suit necessary by persisting in unjustifiable acts." (281 U. S. 179 at p. 200)

VII. *The Decree of April 21, 1930 Ordered a Reduction in Diversion to 6,500 c.f.s. on and After July 1, 1930; to 5,000 c.f.s. on and After December 31, 1935 and to 1,500 c.f.s. on and After December 31, 1938.*

On April 21, 1930, the decree of the Court was entered (281 U. S. 696). This decree provided in part, that: (1) on and after July 1, 1930, the diversion of the waters of the Great Lakes-St. Lawrence system through the Chicago Drainage Canal should be reduced to an annual average of 6,500 cubic feet per second, in addition to domestic pumpage, (2) on and after December 31, 1935 this diversion should be reduced to 5,000 cubic feet per second, in addition to domestic pumpage, and (3) on and after December 31, 1938, this diversion should be reduced to 1,500 cubic feet per second, in addition to domestic pumpage. (Paragraphs 1, 2, 3 of the decree of April 21, 1930, 281 U. S. 696 at pp. 696-697.) The decree further provided that:

"* * * the defendant the Sanitary District of Chicago shall file with the clerk of this Court semi-annually on July 1st and January 1st of each year, beginning July 1st, 1930, a report to this Court adequately setting forth the progress made in the construction of the sewage treatment plants and appurtenances outlined in the program as proposed by the Sanitary District of Chicago, and also setting forth the extent and effects

of the operation of the sewage treatment plants, respectively, that shall have been placed in operation, and also the average diversion of water from Lake Michigan during the period from the entry of this decree down to the date of such report." (281 U. S. 696 at pp. 697-698.)

The final report of the Sanitary District of Chicago to the court, under paragraph 5 of the decree of April 21, 1930, was dated January 1, 1939. In this report the court was notified that thereafter the amount of water diverted from the Great Lakes water shed at Chicago would not exceed 1,500 cubic feet per second, plus domestic pumpage, in accordance with the terms of the decree of April 21, 1930. However, the final report further showed that all of the sewage treatment plants and appurtenances required for treatment of the sewage of the Sanitary District of Chicago, as outlined in the program as proposed by the Sanitary District of Chicago, *had not been completed.* The report stated that work estimated to cost about $14,460,000.00 remained to be completed in the near future. Actually, much work required under the program, adopted by the Sanitary District of Chicago and approved by the Court, still remains to be done as the petition herein shows.

VIII. *The Decree of April 21, 1930 Provided for a Gradual Reduction in the Unlawful Diversion of Water and a Gradual Instead of Immediate Restoration of the Rights of the Lake States in Irder to Permit the Construction of Works Claimed to be Necessary to Protect the Health of the Residents of the Chicago Area.*

The decree of April 21, 1930, as the Lake States are severally informed and believe, provided for a gradual reduction in the unlawful diversion of water and a gradual, rather than immediate, restoration of the rights of the Lake States and their citizens in order to permit the State of Illinois and Sanitary District of Chicago to construct works claimed to be necessary to safeguard the health of the residents of the Sanitary District of Chicago; and the dates and amounts of the progressive reductions in the unlawful diversion provided by the decree of this Court were fixed and determined by the findings of fact as to the time within which the various works, claimed by the defendants to be essential to purify the sewage of Chicago and protect the health of its people, could be constructed and placed in operation. (*Wisconsin et al. v. Illinois et al.*, 281 U. S. 179 (1930).)

The basis and reasons for the progressive rather than instantaneous termination of the unlawful diversion were set forth in the opinion of this Court, rendered by Mr. Chief Justice Taft, in *Wisconsin v. Illinois*, 278 U. S. 367 (1929), where the Court said:

> "* * * If the view urged by the complainants is right, the necessity for the use of the 8,500 cubic feet a second to save the health of the inhabitants of the Sanitary District will then present the problems of the

power and discretion of a court of equity to moderate the strict and immediate rights of the parties complainant to a gradual one which will effect justice as rapidly as the situation permits. The framing of the decree will then require the careful consideration of the Court." (pp. 410-411)

and further:

"* * * In these circumstances we think they are entitled to a decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end. But in keeping with the principles on which courts of equity condition their relief, and by way of avoiding any unnecessary hazard to the health of the people of that section, our decree should be so framed as to accord to the Sanitary District a reasonably practicable time within which to provide some other means of disposing of the sewage, reducing the diversion as the artificial disposition of the sewage increases from time to time, until it is entirely disposed of thereby, when there shall be a final, permanent operative and effective injunction." (pp. 418-19)

"* * * The situation requires the District to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the Lake diversion.

"Though the restoration of just rights to the complainants will be gradual instead of immediate, it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project." (pp. 420-421) (Italics ours)

The decisions of January 14, 1929 (278 U. S. 367) and April 14, 1930 (281 U. S. 179) and the decree of April 21,

1930 (281 U. S. 696), finally adjudged and determined the rights of the Lake States and the duty and obligation of the petitioner. The rights of the Lake States and their peoples so adjudged and determined, were to have the diversion over and above 1,500 cubic feet per second plus domestic pumpage terminated immediately to the end that the great continuing damage to the Lake States and their peoples caused by said illegal diversion should be brought to an end as speedily as possible and "must include everything that is essential to an effective project." The restoration of the adjudged rights of Lake States and their peoples was postponed and made gradual, as a matter of favor to the State of Illinois and its agency, The Sanitary District of Chicago, upon the representation of the State of Illinois and its said agency, The Sanitary District of Chicago, that, notwithstanding their adjudged wrong, they should be given an opportunity and a reasonable time (to December 31, 1938) within which to construct sewage disposal works and all ancillary facilities necessary for the complete treatment of all of the sewage of The Sanitary District of Chicago. The decree specifically imposed upon the petitioner the duties: (1) to reduce the diversion at the time and in the amounts specified in the decree, and (2) to complete by December 31, 1938 everything in the way of sewage treatment works and ancillary facilities that was essential to an effective project. As the court decreed in 1933, the requirement concerning the construction, completion of the sewage treatment works and ancillary facilities "was to preclude any ground of objection on the part of the State of Illinois or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence system or water shed to the extent, and at the times and in the manner, provided in this decree." (289 U. S. 710, 711)

IX. *This Court Found That the Time Fixed for the Final Completion of the Required Works Was As Liberal as the Evidence Allowed.*

This court found that the times fixed by the Special Master for the completion of the various sewage disposal works proposed by the State of Illinois and its said agency, The Sanitary District of Chicago, were as liberal as the evidence permitted (281 U. S. 179, 199 (1930)). With any reasonable diligence, all of said sewage disposal works and ancillary facilities could easily have been fully completed and placed in operation before the time fixed for the ultimate termination of the illegal diversion on or before December 31, 1938.

After inexcusable delays during 1930-1932 in the construction program proposed by the State of Illinois and its agency, The Sanitary District of Chicago, they in November 1932, filed a response to a rule to show cause issued by this court on October 10, 1932, in which the said State of Illinois and its agency, The Sanitary District of Chicago, advised this Court that, notwithstanding previous delays, *adequate time remained for the completion of the sewage disposal works and ancillary facilities within the time fixed by the decree for the ultimate termination of the illegal diversion.*

Although the State of Illinois and its agency, The Sanitary District of Chicago, were never reasonaby diligent in prosecuting the construction program involved in providing complete treatment for all of the sewage of The Sanitary District of Chicago, the progress of construction, as measured by the construction expenditures reported from year to year to this court by The Sanitary District of Chicago, plainly showed that all of these works could have been

completed and placed in operation well before the time fixed for termination of the illegal diversion, if the construction program were prosecuted with any reasonable diligence and funds were provided for that purpose.

X. *In October 1932, Wisconsin, Minnesota, Ohio and Michigan, Complaining of the Delay in the Construction Program, Petitioned the Court for Appointment of a Commissioner or Special Officer to Execute the Decree of April 21, 1930.*

In October, 1932, the States of Wisconsin, Minnesota, Ohio and Michigan applied for the appointment of a Commissioner or other special officer to execute the decree of April 21, 1930 (281 U. S. 696), on behalf of and at the expense of the defendants. The four Lake States complained of the delay in the completion of the sewage treatment works and facilities embraced in the program of the Sanitary District of Chicago for the disposition of sewage so as to obviate danger to the health of the inhabitants of the District on the reduction in diversion on December 31, 1935 and December 31, 1938, as the decree provided, in the diversion of water from the Great Lakes water shed through the Chicago Drainage Canal.

The court directed The Sanitary District of Chicago and the State of Illinois to show cause why they had not taken appropriate steps to effect compliance with the provisions of the decree of April 21, 1930.

XI. *The Court Appointed Edward F. McClennen to Make Summary Inquiry and to Report to the Court His Findings and Recommendations.*

After hearing upon the return of the rule, the court appointed Edward F. McClennen as Special Master to make summary inquiry and to report to the court: (1) as to the cause of the delay in obtaining approval by the Secretary of War of the construction of controlling works in the Chicago River and the steps necessary to obtain such approval and prompt construction; (2) as to the causes of the delay in providing for the construction of the Southwest Side Treatment Works and the steps which should be taken for that purpose, and (3) as to the financial measures on the part of The Sanitary District or the State of Illinois which should be reasonable and necessary to carry out the decree of the court (287 U. S. 578 (1932)).

The Special Master proceeded accordingly and after full hearings submitted his report and recommendations. In his report Special Master McClennen pointed out that:

> "the decree is painful to the defendants (the State of Illinois and the Sanitary District of Chicago) and * * * they have been influenced by a hope that something would happen so that the flow at Lockport need not go as low as the 1,500 c.f.s. to which the decree now limits them, after December 31, 1938, * * *" (Report of Special Master Edward F. McClennen dated March 13, 1933, p. 6).

XII. *The Report of the Special Master Placed the Blame on Petitioners for Failure to Proceed to a Decision on a Site and for Failure to Prepare Plans, Designs, Etc., for the Key Southwest Side Treatment Plant, and for Failure to Apply for Approval of Controlling Works in the Chicago River.*

In his findings the Special Master concluded that: (1) the causes of the delay in obtaining approval of the construction of controlling works in the Chicago River "are a total and inexcusable failure of the defendants to make an application to the Secretary of War for such approval," and (2) the causes of delay in providing for the construction of the Southwest Side Treatment Works are (a) "an inexcusable and planned postponement of the beginning of construction of these works to January 1, 1935, which left an inadequate time for their completion before December 31, 1938, at the rate of progress expected or to be expected under the methods pursued by the Sanitary District," and (b) "the failure to proceed to a definite decision as to site and to the acquisition of a site so chosen," and (c) "the failure to proceed with reasonable diligence to prepare designs, plans and specifications for the works at this site or some other site of the West Side Works." (Report of Special Master Edward F. McClennen, dated March 13, 1933, pp. 5-60, 125-126.)

XIII. *The Special Master Recommended Enlargement of the Decree So As to Require Illinois to Furnish the Money Necessary and to Take Appropriate Steps to Secure Completion of the Facilities Required to Carry Out the Decree of the Court.*

The Special Master concluded, with respect to the steps to be taken to secure completion of the works above mentioned, that because of its financial situation, The Sanitary District is at present powerless to contract "for the design or construction of controlling works or for the construction in a large way of the Southwest Side Treatment Works." He further concluded that "in the conditions which now exist, there is no reasonable financial measure which the Sanitary District can take, which it is failing to take"; and that "no way has come to light whereby this decree can be performed under tolerable conditions, *unless the State of Illinois meets its responsibility and provides the money*" (Italics ours). (Report of Special Master Edw. F. McClennen, dated March 13, 1933, pp. 61-88, 126.) The Special Master then recommended that the decree of April 21, 1930 be enlarged so as to require the State of Illinois to provide the moneys necessary and to take the appropriate steps, to secure the completion of adequate facilities for the treatment and disposition of the sewage in order to carry out the decree of the United States Supreme Court. (Report of Special Master, Edw. F. McClennen, dated March 13, 1933, pp. 61-112, 126-128.)

Upon that report, this court on May 22, 1933, rendered its decision (*Wisconsin et al. v. Illinois et al.*, 289 U. S. 395), affirming the Special Master's report.

XIV. *The Court Approved the Master's Report and Ordered That the Original Decree be Enlarged to Require the State of Illinois to Provide the Money Necessary and to Take Appropriate Steps to Secure Prompt Completion of Treatment Works and Facilities Required by the Decree of April 21, 1930.*

In approving the report of Special Master, Edward F. McClennen, this court held that it was the special responsibility of the State of Illinois to provide the money needed to effect the construction and prompt completion of the sewage treatment works and complementary facilities required to give complete treatment of all of the sewage of The Sanitary District of Chicago, in order to carry out the decree. In this connection, the court said:

> "The question, then, comes down to the procuring of the money necessary to effect the prompt completion of the sewage treatment works and the complementary facilities. To provide the needed money is the special responsibility of the State of Illinois. For the present halting of its work the Sanitary District is not responsible. It appears to be virtually at the end of its resources. The Master states that, due to its financial situation, the Sanitary District cannot go forward in any adequate manner with either contracts or construction. We find that the Master's conclusion, that there is no way by which the decree can be performed under tolerable conditions 'unless the State of Illinois meets its responsibility and provides the money,' is abundantly supported by the record.
>
> "That responsibility the State should meet. Despite existing economic difficulties, the State has adequite resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable pro-

tection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged." (Wisconsin et al. v. Illinois et al., 289 U. S. 395, 410-411.)

XV. *On May 22, 1933, the Original Decree of April 21, 1930, Was Enlarged So As to Require the State of Illinois to Take All Necessary Steps to Secure the Moneys Needed for the Completion of Adequate Sewage Disposal Plants and Incidental Facilities for the Disposition of the Sewage of the Area Embraced Within the Area of the Sanitary District of Chicago.*

On the same day this court enlarged the original decree of April 21, 1930, by the addition of the following provisions:

"That the State of Illinois is hereby required to take all necessary steps, including whatever authorizations or requirements, or provisions for the l sing, appropriation and application of moneys, may be needed in order to cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers, together with controlling works to prevent reversals of the Chicago River if such works are necessary, and all other incidental facilities for the disposition of the sewage of the area embraced within the Sanitary District of Chicago so as to preclude any ground of objection on the part of the State or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence system or watershed to the extent, and at the times and in the manner, provided in this decree." (289 U. S. 710)

XVI. *In 1940, Illinois Petitioned the Court for a Temporary Increase Until December 31, 1942, in Diversion of Lake Michigan Water to 5,000 Cubic Feet Per Second, Pus Domestic Pumpage on the Ground That a Dangerous Condition to Public Health Existed Along the Sanitary District Canal and the Illinois Waterway.*

On January 11, 1940, the State of Illinois filed its petition in this court for temporary modification of the decree of April 21, 1930, so as to obtain increased diversion of water from Lake Michigan. In its petition, which the State of Ilinois filed at the insistence of certain communities bordering on the Illinois waterway, including Lockport and Joliet, it was alleged that the system for the treatment of sewage had not yet been completed and would not be completed until the end of the year 1943, and that, as a result of the introduction of untreated sewage into the Illinois waterway an "obnoxious, noisome, filthy, unsanitary and dangerous condition to public health" exists along the Sanitary District Canal and the Illinois waterway. The petition asked for a temporary increase to 5,000 cubic feet per second of water from Lake Michigan, plus domestic pumpage for the preservation of the health of the inhabitants of the complaining communities.

On January 29, 1940, a rule to show cause was issued by this court to the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York requiring the said states to show cause why the petition for temporary modification of the decree of April 21, 1930 should not be granted. On February 26, 1940, the return of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York to the rule to show cause on the application of the State of Illinois

for temporary modification of the decree of April 21, 1930, was filed in this court. On April 3, 1940, after having heard oral argument and after having considered the briefs of petitioner and the opposing Great Lake States, this court filed a per Curiam opinion (309 U. S. 569 at 571) in which the Court pointed out that:

> *"The State of Illinois has failed to show that it has provided all possible means at its command for the completion of the sewage treatment system as required by the decree as specifically enlarged in 1933* (289 U. S. 395, 710, 77 L. ed. 1283, 1465, 53 S. Ct. 671, 788). *No adequate excuse has been presented for the delay.* Nor has the State submitted appropriate proof that the conditions complained of constitute a menace to the health of the inhabitants of the complaining communities or that the State is not able to provide suitable measures to remedy or ameliorate the alleged conditions without an increase in the diversion of water from Lake Michigan in violation of the rights of the complainant States as adjudged by this court.
>
> "In order, however, that the Court may be satisfied as to the actual condition of the Illinois Waterway by reason of the introduction of untreated sewage, and as to the actual effect, if any, of that condition upon the health of the inhabitants of the complaining communities, and also with respect to the feasibility of remedial or ameliorating measures available to the State of Illinois without an increase in the diversion of water from Lake Michigan, the Court appoints a Special Master to make a summary inquiry as to such condition, effect and measures, and to report to this Court with all convenient speed." (Italics ours)

XVII. *Special Master Monte M. Lemann Was Appointed to Make Summary Inquiry and Report to the Court.*

Honorable Monte M. Lemann was appointed as Special Master to make summary inquiry and to report to the court with all convenient speed, with respect to the actual condition of the Illinois waterway and whether that condition "constitutes an actual menace to the health of the inhabitants of the complaining communities, and also with respect to the feasibility of remedial or ameliorating measures available to the State of Illinois without an increase in the diversion of water from Lake Michigan." (309 U. S. 636)

XVIII. *The Report of Special Master Lemann Recommended Dismissal of Illinois' Petition for Increased Diversion.*

After extended hearings the report of the Special Master, dated March 31, 1941, which recommended dismissal of the petition for increased diversion of lake waters was filed. The report pointed out among other things, that the State of Illinois and its agency, The Sanitary District of Chicago, have never been influenced by a desire to complete the sewage treatment plants as soon as possible as required by the decree but that petitioners have always been governed by the thought of completing a sewage system at as little expense as possible regardless of the time element. In this connection Special Master Lemann states (p. 107):

> "In his report on re-reference Special Master Hughes commented that:
>
> 'Much time can be saved or lost in large building operations according to the attitude which is

taken as to the importance of early completion. In the present case, the Court has already laid down the requirement that the word shall proceed "with all reasonable expedition."'

"The record indicates that the Sanitary District has been influenced, not so much by the desire to make speed, as by the purpose ultimately to complete an efficient system at as little expense as possible to its taxpayers. These are praiseworthy motives when considered from the standpoint of the District alone, but they may not replace the emphasis upon expedition to which the legitimate protection of the interests of the opposing States entitles them." (Report of Special Master Lemann, March 31, 1941, at p. 107.)

The Special Master made the finding that "the facts proven did not establish any menace to the health of the inhabitants of Lockport and Joliet, or elsewhere along the waterway in requiring an increase in the diversion of water from Lake Michigan." (Report of Special Master Lemann, March 31, 1941, p. 54.) The Special Master's recommendation for a decree was:

"That a decree be entered dismissing the petition and the modified petition of the State of Ilinois for a modification of the decree of April 21, 1930, * * *." (Report of Special Master Lemann, March 31, 1941, p. 114.)

XIX. *The Court on May 26, 1941, Dismissed the Petition and Modified Petition of Illinois, with Costs.*

This court, on May 26, 1941, in a Per Curiam opinion, overruled all exceptions to the report of the Special Master and dismissed the petition and modified petition of the State of Illinois, with costs (313 U. S. 547).

C. THE ALLEGED CHANGE IN CONDITIONS SINCE THE ENTRY OF THE ORIGINAL DECREE MAKES NO CASE FOR CLARIFICATION OR INTERPRETATION OF THE DECREE

The gist of the petition herein respecting the alleged change in conditions is the claim that the human population of the Sanitary District in 1930 was 3,901,569 and that this had increased to 4,144,000 in 1949, plus the fact that the Legislature of Illinois had authorized, since the decree, annexation of additional communities thereby increasing the area of the Sanitary District from 442.35 square miles with 60 communities in 1930 to 470.18 square miles with 70 cities and villages in 1950.

We submit that the increase in population in the District by 242,431 people in the 20 years since entry of the original decree plus the addition of 27.83 square miles of territory including 10 municipalities in that time makes no case for clarification and interpretation of the decree of April 21, 1930, as amended in 1933.

The fact is that the entire construction program of the Sanitary District of Chicago was a long-range program in which the population factor was a very important one. This construction program was predicated upon an average growth within the Sanitary District of from 700,000 to 750,000 people every ten years. (See Special Master Charles Evans Hughes' exhibit B on the 1929 re-reference, joint abstract of record of hearings upon exceptions to Special Master's report on re-reference, filed February 20, 1930, pp. 116, 140-141, testimony of petitioner's witness, George M. Wisner, transcript of testimony, p. 3681, joint abstract of

record filed February 20, 1930, p. 430, petitioner's exhibit 1157 on original hearings, 1926-1927.)

In November and December of 1889, the Sanitary District of Chicago was organized under the Illinois Statute entitled "An act to create sanitary districts and remove obstructions in the Des Plaines and Illinois Rivers," approved May 29, 1889, and published in the Illinois laws for the year 1889 commencing at page 186 and has continuously existed under said act of 1889 and the acts amendatory thereof and supplementary thereto. At the time of its organization in 1889 the Sanitary District of Chicago consisted of a territory 185 miles in area. By successive acts the area of the Sanitary District of Chicago was enlarged to embrace 395 square miles by the year 1925 when the Motion to Amend Bill of Complaint herein was filed by Wisconsin, Minnesota, Ohio and Pennsylvania. (See pages 7-9, Motion of Wisconsin, Minnesota, Ohio and Pennsylvania to Amend Bill of Complaint, 1925.)

On April 21, 1930 the area of the Sanitary District of Chicago embraced an area of 442.35 square miles. (See pending petition of the State of Illinois and the Sanitary District of Chicago, page 8.)

In Special Master's exhibit B, p. 116, appears the following:

> "Population and Growth:
>
> "In planning works for sewage disposal, it is necessary to consider the future population of the locality. It is not financially practicable to make expenditures now for a problematical future. It is necessary, however, to determine the future populations approximately and to adopt works capable of construction in units that may be increased in capacity from time to time

as occasion requires, without destroying previous expenditures. Thus, each dollar expended will provide a link in a complete chain of sewage disposal works.

"We have examined the forecast of population as estimated by the Sanitary District of Chicago, and we believe it represents future probabilities as accurately as required for the above purpose. This estimate covering the population of the Sanitary district is as follows:

1920 census,	2,978,635
1930	3,710,000
1940	4,425,000
1950	5,140,000
1960	5,850,000
1970	6,580,000"

The testimony of petitioner's witness, Langdon Pearse, summarized in Special Master Hughes' report on re-reference, filed December 17, 1929, p. 13, is as follows:

"Mr. Pearse has been connected with the Sanitary District of Chicago since 1909, and as sanitary engineer has made a comprehensive and thorough study of its sewage disposal problems. He prepared the plans for, and supervised, the construction of the Calumet, Des Plaines River, Northbrook, Glen View, Morton Grove and North Side Treatment Plants, of the Sanitary District and has provided plans for, and supervised, the existing work on the West Side Sewage Treatment Plant. He has also had considerable experience as consulting sanitary engineer in private practice. In connection with the Sanitary District work he has visited sewage plants of the United States, England, France and Germany for the purpose of ascertaining the best and latest methods. Mr. Pearse testified that the population served by these works at the end of fifteen years (1945) would be 6,366,000, including a human popula-

tion of 4,785,000 and an additional number estimated at 1,581,000 for what is called 'the population equivalent allowed for industrial wastes.' In his opinion, the plan submitted 'for sewage treatment up to 1945 is the best plan that can be devised to take care of all the sewage of the population, whether the effluent goes to the Mississippi watershed or whether it goes to the Lake.'

"The growth of the population, with the District, after the year 1945, has been estimated at from 60,000 to 100,000 a year. Additional works will have to be added to carry the treatment forward and the Sanitary District has estimated an amount of $9,070,000 to make provision for this purpose to the year 1955."

Exhibit No. 1157, entitled "The Technical Basis for the Recommendation of the Board of Review," dated January 23, 1925, and being a report of the Engineering Board of Review of the Sanitary District of Chicago, was introduced by the State of Illinois and the Sanitary District of Chicago on the original hearings in 1926-1927 in Wisconsin et al. v. Illinois et al. This exhibit discussed the size of the Sanitary District and the growth of the population therein, past and prospective, as follows:

"The boundaries of the Sanitary District are fixed by State laws. The original area was 185 square miles, containing a population of 1,140,000. The same conditions which forced the original start of the City of Chicago have maintained to the present day a phenomenal rate of growth, a rate almost unprecedented among the large cities of the world. This rapid growth has accentuated its difficulties in coping with natural deficiencies such as lack of good drainage. Furthermore, the Sanitary District of Chicago has grown even more than the City. The area has several times been en-

larged since it was first organized and now includes the whole of Chicago and 49 other cities and villages, containing in all 437.39 square miles, with a population of about 3,300,000 in 1924, and an assessed valuation of $1,965,000,000. The population is increasing steadily at the rate of about 70,000 persons a year and the assessed valuation increases about $50,000,000 per year. (See Tables 1 and 2):

"TABLE 1—GROWTH OF POPULATION
PAST AND PROSPECTIVE

Year	Chicago	Sanitary District	Year	Chicago	Sanitary District
1900	1,699,000	1,640,000	1925	3,004,000	3,355,000
1901	1,748,000	1,688,000	1926	3,059,000	3,426,000
1902	1,796,000	1,736,000	1927	3,114,000	3,497,000
1903	1,845,000	1,934,000	1928	3,169,000	3,568,000
1904	1,893,000	1,985,000	1929	3,224,000	3,639,000
1905	1,942,000	2,035,000	1930	3,279,000	3,710,000
1906	1,991,000	2,090,000	1931	3,334,000	3,782,000
1907	2,039,000	2,144,000	1932	3,389,000	3,854,000
1908	2,088,000	2,195,000	1933	3,444,000	3,926,000
1909	2,136,000	2,250,000	1934	3,499,000	3,998,000
1910	2,185,000	2,308,000	1935	3,554,000	4,070,000
1911	2,239,000	2,370,000	1936	3,609,000	4,142,000
1912	2,294,000	2,432,000	1937	3,664,000	4,214,000
1913	2,348,000	2,509,000	1938	3,719,000	4,288,000
1914	2,403,000	2,589,000	1939	3,774,000	4,354,000
1915	2,457,000	2,652,000	1940	3,829,000	4,425,000
1916	2,511,000	2,716,000	1941	3,884,000	4,497,000
1917	2,566,000	2,782,000	1942	3,939,000	4,569,000
1918	2,620,000	2,846,000	1943	3,994,000	4,641,000
1919	2,675,000	2,916,000	1944	4,049,000	4,713,000
1920	2,729,000	2,986,000	1945	4,104,000	4,785,000
1921	2,784,000	3,063,000			
1922	2,839,000	3,143,000			
1923	2,894,000	3,214,000			
1924	2,949,000	3,284,000			

(Petitioner's Exhibit 1157, Part II, pp. 8-9, on original hearings, 1926-1927)

And again, in discussing the alleged dilution requirements in 1945 and in 1955, the Sanitary District of Chicago, in its estimate of the prospective growth in population, Exhibit 1157 further shows:

> "81. *Dilution Requirements in 1945.* It is estimated that in 1945 the human population will be 4,785,000 and the industrial-equivalent population 2,000,000, or a total of 6,785,000.
>
> "87. *Dilution Requirements in 1955.* It is estimated that in 1955 the human popuation will be 5,500,000 and the industrial wastes equivalent-population 2,200,000, or a total of 7,700,000."
>
> (Exhibit 1157, Part II, pp. 56 and 57)

Exhibit 1174 introduced by the State of Illinois and the Sanitary District of Chicago at the original hearing, the 1926-1927 reference, is an estimate of human population and population-equivalent of industrial wastes within the Sanitary District of Chicago and shows:

> ". . . in 1920 a human population of 3,000,000 and a population-equivalent of 1,500,000; in 1925, 3,355,000 human and 1,600,000 population-equivalent; in 1930, 3,710,000 human and 1,700,000 equivalent; in 1935, 4,070,000 human and 1,800,000 equivalent; in 1940, 4,425,000 human and 1,900,000 equivalent; in 1945, 4,785,000 human and 2,000,000 equivalent; in 1950, 5,140,000 human and 2,100,000 equivalent; in 1955, 5,500,000 human and 2,200,000 equivalent; in 1960, 5,860,000 human and 2,300,000 equivalent, and in 1970, 6,580,000 human and 2,500,000 equivalent."
>
> (From Joint Abstract of Record for Hearing upon Exceptions to the Special Master's Report on Re-reference, pages 509 and 510)

This exhibit which was introduced by Langdon Pearse who then was and who still is the Chief Sanitary Engineer of the Sanitary District of Chicago shows an estimate of the population of the District to the year 1970.

One of the principal witnesses called by the State of Illinois and the Sanitary District of Chicago at the original hearing was George M. Wisner, who was then a consulting engineer for the Sanitary District and who had been connected with the Sanitary District since July 1892. Mr. Wisner, in discussing the population growth of the City of Chicago testified that:

> "In 1890 the population of the City of Chicago was about a million. When the canal was opened in 1900, it had 1,500,000 people, and by 1910 that had increased, speaking from memory, over 500,000, and by 1920 it had reached nearly 3,000,000 people. *At the present time, as nearly as we can estimate it, it is increasing at the rate of from seven hundred to seven hundred and fifty thousand every ten years.* It is a real problem, with the engineers to keep track of the population and its increase, as it becomes a real problem in taking care of the sewage as the city grows, particularly when one appreciates that this seven hundred to seven hundred and fifty thousand is a population that is fifty per cent, in round numbers, in excess of the present population of the City of Milwaukee." (Italics ours)
>
> (From Joint Abstract of Record for Hearing upon Exceptions to the Special Master's Report on Re-reference, filed Feb. 20, 1930, page 430)

In the report of the Special Master, Honorable Charles Evans Hughes, filed in this court November 23, 1927, the organization and increase in area of the Sanitary District of Chicago was discussed at pages 17 and 18 as follows:

"4. *The Sanitary District of Chicago.* The defendant, the Sanitary District of Chicago, was organized under the Illinois Act of 1889. Its organization was completed in 1890. Originally, the district embraced an area of 185 square miles. By later acts this was increased so that the district now comprises approximately 438 square miles, extending from the Illinois State line on the south and east, the northern boundary of Cook County on the north, with about 34 miles of frontage on Lake Michigan, thus embracing what may be called the metropolitan area of Chicago, consisting of Chicago and its suburbs, a total of 54 cities, towns and villages."

It is manifest from the foregoing that the Special Master, Honorable Charles Evans Hughes, and this court had before them full information with respect to the long range program of the Sanitary District of Chicago. The inevitable increases in population and size within the Sanitary District of Chicago manifestly were known and considered in the judgment of the court and in the formulation of the decree. There was no reason to suppose that Chicago would stand still while the rest of the nation increased in population. That the area and population of the District would increase in the future as in the past was both known and scientifically appraised by petitioners, the Special Master and the court. It seems strange beyond words that it took the petitioners twenty years to discover that to their way of thinking the decree of April 21, 1930 is ambiguous.

This petition represents another in the long chain of attempts by petitioners to avoid compliance with the decree of April 21, 1930, or to justify petitioners' inexcusable negligence or wilful failure to comply fully with said decree.

We respectfully submit that the petition should be dismissed with costs.

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Dated this 15th day of September, 1950.